NO. 17,049

IN THE

United States

Court of Appeals

For the Ninth Circuit

WILLIAM CARL CUNNINGHAM, ET UX., and GLENN A. PRICE, ET UX.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court
for the District of Arizona
(No. Civ-2962 Phx. and No. Civ-2963 Phx.)

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

JURISDICTIONAL STATEMENT

Plaintiffs filed their complaint in the District Court of the District of Arizona at Phoenix naming the United States as a Defendant pursuant to the Federal Tort Claims Act (28 U.S.C.A. 1346, 2671, et seq.,) filed on Oct. 14, 1958. On January 19, 1959, pursuant to Plaintiffs' Motion to Consolidate for Trial, the case was set for trial on October 6, 1959. On October 6, 1959, the case was dismissed by Order of the Court; on April 28, 1960, an Order of Court was entered denying the Motion to Vacate Judgment. The jurisdiction of this Court to review the District Court's decision is conferred by 28 U.S.C. 1291.

QUESTION PRESENTED

Did the District Court abuse its discretion in failing to grant and in denying the Appellants' Motion to Vacate Judgment?

STATUTES INVOLVED

Federal Rules of Cvil Procedure, 28 U.S.C. Annotated, Rule 60(b):

This appeal has the central issue of whether or not the District Court abused its discretion when it denied the Plaintiffs' Motion to Vacate the Order Dismissing the Complaint. Pursuant to Rule 60(b), the Statute reads as follows:

"(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a

judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., ¶ 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. As amended Dec. 27, 1946, eff. March 19, 1948; Dec. 29, 1958, eff. Oct. 20, 1949."

STATEMENT OF THE CASE

On or about the 14th day of October 1958 the Appellants filed complaints in the United States District Court for the District of Arizona at Phoenix alleging in effect that the United States was liable to said Appellants for money damages due to the fact that an agent of the Federal Aviation Administration negligently gave unsafe radio directions and the plane in which the Appellants were occupants crashed short of the runway. (R-3-12). On January 19, 1959, their claims were consolidated for trial (R-19). The case was set for trial on October 6, 1959. The Appellants arrived in the Phoenix area and stayed at the Sahara Hotel in Phoenix from approximately October 1st through October 6th (R-221-226). The affidavit of the Appellants reflects that they had been engaged in the consumption of large amounts of intoxicating beverages, and they had a discussion with their legal counsel, Miss Virginia Hash, in the afternoon of the day before trial on which day the case was set for retrial, and that they then did not make themselves present in the District Court on October 6, 1959. They knew the case was set for trial on October 6, 1959, but they deliberately and knowingly did not make themselves present (R-221-226). The record is barren and no one has at any time taken the position that the Appellants took any steps to notify the Court that they

would not be present or rectify the situation in any manner whatsoever. According to Appellants brief (B(4)), they then left the area of Phoenix at an undetermined time and returned to Seattle, Washington, where they obtained counsel who applied to the District Court in Arizona for a Motion to Vacate Judgment pursuant to 28 U.S.C.A. Rule 60(b), Federal Rules of Civil Procedure (R-207). The hearing on this Motion was held on February 8, 1960 (Appendix B). At that time affidavits were filed with the Court in support of Appellants' Motion to Vacate the Judgment and reinstate the claims for injuries and damages. The Court took under advisement the Plaintiffs' Motion of February 8, 1960, and at its discretion on April 28, 1960, denied the Motion to Vacate and reinstate the claim for Plaintiffs' injuries. The Plaintiffs have not acted in good faith even if the facts are viewed in the light most favorable to the Appellants: they did not take any action to notify the Court or any one else that they had had a disagreement with their counsel concerning their physical and mental health and took no steps that a reasonable and prudent man would take under the circumstances knowing that their cause was set for trial the next day. For reasons known only to themselves they willfully refused to present themselves for trial to prosecute their claims (R-221-226).

SUMMARY OF ARGUMENT

It is the Appellees' position that the decision of the District Court was correct and should be sustained for the following reasons:

I. That the District Court did not abuse its discretion in denying the Motion to Vacate the Order.

II. The District Court did not abuse its discretion in failing to vacate and set aside its Order of Dismissal, and did not abuse its discretion in refusing to grant the

Appellants' Motion and in denying their Motion for Order Setting Aside the Order of Dismissal for apparent want of prosecution.

II-A. The District Court did not abuse its discretion in laying aside and ignoring affidavits presented by the Appellants even if the affidavits were not controverted by the F.B.I. investigation.

II-B. The District Court did not abuse its discretion in permitting a manifestly inequitable and unconscionable judgment to stand.

III. The Appellants are not being charged with erroneous advice of counsel, and even if counsel did give them erroneous advice, they should not be permitted to reopen and renote their claims for trial on the merits.

IV. The Appellants have presented nothing to this Court to substantiate a reversal by this Court of the action of the District Court.

IV-A. The Government agrees that the unqualified Order of Dismissal operates as a Judgment of Dismissal with prejudice under both state and federal law.

IV-B. The Government agrees that the Courts are loathe to impose forfeiture, particularly in situations of default where the equities require trial on the merits to impose forfeiture.

IV-B-1. The Government agrees that if there were newly discovered evidence it would be a proper ground for new trial.

IV-B-2. The Government agrees that Rule 60(b) should be liberally construed in cases of forfeiture for want of prosecution.

ARGUMENT

I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE ORDER TO VACATE THE ORDER OF DISMISSAL.

The real issue in this case is whether or not the Appellants have sustained their burden of showing that there was a mistake, inadvertence, excusable negligence or any other reason justifying relief from the operation of the Judgment, pursuant to Rule 60(b) and that the District Court abused its discretion in denying their motion. This Court has repeatedly held that a petition to vacate a judgment is addressed to the sound legal discretion of the Trial Court and its determination will not be disturbed except for abuse of discretion. *Independence Lead Mines Company vs. Kingsbury, et al.,* 9 Cir., 1949, 175 F.2d 983; *Cole vs. Fairview Development, Inc.,* 9 Cir., 1955, 226 F.2d 175, 176; *Siberell vs. United States,* 9 Cir., 1959, 268 F.2d 61; *Russell vs. Cunningham,* 9 Cir., 1960, 279 F2d 797 at 804.

At the time the District Court entered its original Order of Dismissal of October 6, 1959, the Plaintiffs were not present to prosecute their claim and their attorney had withdrawn from the case (Appendix A). The Appellants do not seriously contest the Court's authority to dismiss a claim that has been set for trial for several months and where the plaintiff does not appear in Court to prosecute; therefore the Order entered on October 6, 1959, was valid. The Appellants are really contending in this argument that there was a good reason for their failure to appear in Court. This excuse not to be present in court for their trial, although elusive, seems to be set forth by the Appellants on the following grounds:

1. The District Court abused its discretion in laying aside and ignoring affidavits presented by the Appellants. At the outset, the Government is agreed and does not attempt to dispute the fact that the Judgment appealed from is a final one and that the general rule of law is that motions brought, pursuant to Rule 60(b), should be treated liberally by the courts in order to grant the parties their day in court; however, the Appellants should first have the burden of meeting one of the requirements of Rule 60(b) so that the order can be set aside if it appears that the trial court abused its discretion. The position of the Appellants is that their affidavits show good reason why the Judgment should be set aside. These reasons are that they were misadvised and misapprised by counsel. The only thing that the record shows according to Appellants' affidavits (Record 221-226) is that on the afternoon before the trial Miss Hash had an adverse reaction to the Appellants in that she either correctly or mistakenly judged the Plaintiffs as being intoxicated and advised that the Court would dismiss the case and hold the Plaintiffs in contempt if they presented themselves in an intoxicated condition in Court. This is the only inference possible to draw from the affidavits of the Appellants, particularly on Page 222 and Page 225. It should be noted that this alleged conversation between Appellants and counsel took place the day before trial. Nowhere do Appellants allege that Miss Hash advised them not to be present. Nowhere is it alleged that Miss Hash advised them or gave the impression that she would no longer represent them. The only reference to this point in the affidavits is on Pages 222 and 225, which is to the effect that Miss Hash was mistaken when she thought they were drunk the afternoon before the trial. Miss Hash was present in Court the morning of the day set for trial (Appendix A). The Plaintiffs were not present (Appendix A). No-

where in this record, or anywhere else, do they ever say why they were not present.

2. Appellants' contention furthermore is that the Plaintiffs gave good reasons for not being in Court, to-wit: that they were misadvised and misapprised by counsel (Appellants' Brief Page 8) and that FBI Agents were sent to investigate the truth of Appellants' affidavits but presented nothing for the Court's record and therefore in fact the Government admits the truth of the affidavits in their entirety. This is not true. The FBI did investigate the matter and made a written report, a part of which is set out in Appendix C, to the effect that Appellants' affidavits are controverted. There was no burden on the Court to make the FBI report part of the record. A pertinent part of that report, although not in the record, is set forth here because the Appellants have mentioned the FBI report together with an erroneous conclusion. The full report is in the Office of the United States Attorney for the District of Arizona and is available for inspection by the Appellants and will be made a part of the record if the Appellants so desire and the Court grants permission.

The Court at all times had a desire to understand the factual situation (Appendix B). No matter what interpretations are placed on the affidavits of the Plaintiffs it is still quite clear that they, of their own free will, made the decision not to appear at the time set for the trial. Although it is difficult to find a case directly on point in this matter, it is interesting to note what the Supreme Court of the United States has stated concerning a situation where the Defendant, under a mistaken impression that the law was against him, deliberately refused to prosecute an appeal. *Polites v. United States,* 364 U.S. 426, 431-433, 1960. This decision is the

latest Supreme Court case on this point and the Court said:

"On August 6, 1958, the petitioner filed his motion under Rule 60(b)(5) and (6) to set aside the 1953 denaturalization decree. The ground for the motion, supported by an affidavit of counsel, was that in the light of this Court's opinions in two cases which had recently been decided, *Nowak v. United States,* 356 U.S. 660, and *Maisenberg* v. *United States,* 356 U.S. 670, 'it now appears that the . . . judgment of cancellation is voidable' and 'that it is no longer equitable that said judgment should have prospective application.' In denying the motion the District Court held that the *Nowak* and *Maisenberg* decisions 'do not as contended by Polites clearly control the instant case warranting relief from judgment,' and that, in any event, the doctrine of *Ackermann v. United States,* 340 U.S. 193, precludes reopening a judgment under Rule 60(b) where the movant has voluntarily abandoned his appeal, and the only ground for the motion to reopen is an asserted later change in the judicial view of applicable law. 24 F.R.D. 401. The Court of Appeals affirmed 'for the reasons set forth' by the District Court, 272 F. 2d 709.

* * *

"In the present case it is not claimed that the decision not to appeal was anything but *'free, calculated, and deliberate.'* Indeed, there is not even an indication in this case, as there was in *Ackermann,* that the choice was influenced by reliance upon the advice of a government officer. The only claim is that upon the advice of the petitioner's own counsel the appeal was abandoned because there seemed at the time small likelihood of its success, and that some four years later the applicable law was 'clarified' in the petitioner's favor.

"Despite the relevant and persuasive force of *Ackermann,* however, we need not go so far here as to decide that when an appeal has been abandoned or not taken because of a clearly applicable adverse rule of law,

relief under Rule 60(b) is inflexibly to be withheld when there has later been a clear and authoritative change in governing law. The fact of the matter is that that situation is not presented by this case. Without assaying by hindsight how hopeless the prospects of the petitioner's appeal may have appeared at the time it was abandoned, it is clear that the later decisions of this Court upon which his motion to vacate relied did not in fact work the controlling change in the governing law which he asserted. The decisions in question are *Nowak v. United States,* 356 U.S. 660, and *Maisenberg v. United States,* 356 U.S. 670." Emphasis supplied. *Polites v. United States,* 364 U.S. 426, 431-433, 1960.

This case was based on *Ackermann v. United States,* 340 U.S. 193, 197-200, 1950. A pertinant part of the Ackerman case, supra, is quoted below:

"It will be noted that petitioner alleged in his motion that his failure to appeal was *excusable.* A motion for relief because of excusable neglect as provided in Rule 60(b) (1) must, by the rule's terms, be made not more than one year after the judgment was entered. The judgment here sought to be relieved from was more than four years old. It is immediately apparent that no relief on account of 'excusable neglect' was available to this petitioner on the motion under consideration.

"But petitioner seeks to bring himself within Rule 60(b) (6), which applies if 'any other reason justifying relief' is present, as construed and applied in *Klapprott v. United States,* 335 U.S. 601. The circumstances alleged in the motion which petitioner asserts bring him within Rule 60(b)(6) are that the denaturalization judgment was erroneous: that he did not appeal and raise that question because his attorney advised him he would have to sell his home to pay costs, while Kelley, the Alien Control Officer, in whom he alleges he had confidence and upon whose advice he relied, told him 'to hang on to their home' and that he would be released at the end of the war;

and that these circumstances justify failure to appeal the denaturalization judgment.

"We cannot agree that petitioner has alleged circumstances showing that his failure to appeal was justifiable. It is not enough for petitioner to allege that he had confidence in Kelley. On the allegations of the motion before us, Kelley was a stranger to petitioner. In that state of the pleadings there are two reasons why petitioner cannot be heard to say his neglect to appeal brings him within the rule. First, anything said by Kelley could not be used to relieve petitioner of his duty to take legal steps to protect his interest in litigation in which the United States was a party adverse to him. *Munro v. United States,* 303 U.S. 36; *Burnham Chemical Co. v. Krug,* 81 F. Supp. 911, 913, aff'd *per curiam sub nom. Burnham Chemical Co v. Chapman,* 86 U.S. App. D.C. 412, 181 F.2d 288."

* * *

"By no stretch of imagination can the voluntary, deliberate, free, untrammeled choice of petitioner not to appeal compare with the Klapprott situation. MR. JUSTICE BLACK set forth in order the extraordinary circumstances alleged by Klapprott. We paraphrase them and give the comparable situation of Ackermann."

Ackermann v. United States, 340 U.S. 193, 197-200 (1950)

Admittedly these cases are not directly in point, however, they do show the reasoning of the Supreme Court that when one takes a deliberate course of action with knowledge of their attorney's opinion, it cannot be considered to be excusable neglect under Rule 60(b). Although it is never specifically stated on just exactly what ground the Appellants here qualified for relief under Rule 60(b), it is assumed that one of their propositions is excusable neglect and the mistake of their attorney. Assuming for the moment that their attorney was mistaken in assuming that they were drunk the day

before trial, does this give them an excuse to not be present the day of trial, and furthermore, did they do all that could be expected of them and thus entitle themselves to absolution from responsibility for their attorney's negligence? The Court in *Ledwith v. Storkan,* 2 F.R.D. 539, 544, 545, deals with what constitutes excusable neglect and the Court said:

> "Save in those cases where the court has granted its indulgence without real study and as if the vacation of the judgment were virtually an arbitrarily demandable right of the delinquent party, there is no practical difference of opinion upon the point that neglect or inadvertence resulting in default will not alone justify the vacation of the ensuing judgment. The neglect or inadvertence must be excusable, and real and practical grounds for excuse must be factually shown in support of the motion.
>
> "It may be added that while inadvertence and neglect are not precisely identical in their connotations they are often classified as synonymous. See Webster's New International Dictionary 1925 Edition. They are frequently employed interchangeably in applying the tests imported into Rule 60(b). And finally, though in the rule, and in the statutes underlying it, the word 'excusable' does not precede the word 'inadvertence,' the pertinent decisions deny relief on the ground of inadvertence unless it is actually excusable.
>
> "Precisely what circumstances will avail to render the neglect of counsel excusable may not be adequately set down. But some measure of excusability may be gotten from decisions where relief has been granted. They include (a) continuous preoccupation with the trial of a distracting first degree murder case, (b) reliance on assurance by the court or a clerk thereof or opposing counsel as to the time of a trial, (c) failure to reach the place of trial in consequence of casualties in traffic, (d) sudden illness of counsel, (e) unanticipated summons to the bedside of a dying relative, and other like incidents. In each instance there was inad-

vertence or neglect which intercepted the timely performance of a required act, but there was likewise some disturbing and distracting event which rendered the error excusable.

"Inevitably, the argument of the defendants must proceed to the point where they assert, that having employed counsel for the protection of their interests, *they did all that could be expected of them and are entitled to absolution from responsibility for their attorney's negligence.* But that seems not to be a tenable position, for by the weight of authority the negligence of counsel in this behalf is imputed to his client. An analysis of cases relevant to the issue is made in a note to *Citizens' National Bank of Sisseton v. Branden,* 19 N.D. 489, 126 N.W. 102, in the report of that case appearing in 27 L.R.A., N.S., on page 858. See also 34 C.J. 307-313.

"So, it appears to the court that the showing in support of the motions will not sustain their allowance. The vacation of a default judgment duly entered without fraud or overreaching, is not an action which the court should take arbitrarily or as a courtesy or favor to the losing party. Unless and until he shows that his default and the resultant judgment are attributable to his 'mistake, inadvertence, surprise or excusable neglect,' the rule invoked confers no auauthority upon the court to vacate the judgment and allow him to answer. In the absence of such a showing, the judgment must stand regardless of any inclination towards indulgence, to which the court may be prompted.

"Even when he makes the showing required by the rule, his claim to relief is not absolute. He merely invokes them, and by that showing, the exercise by the court of a sound judicial discretion as to whether the vacation solicited should be allowed. It is true that, upon adequate showing, the court's discretion should ordinarily incline towards granting rather than denying relief, especially if it be manifest that no intervening rights have attached in reliance upon the judg-

ment and no actual injustice will ensue. And the reported decisions under the rule reflect the pursuit of that practice.

"But the admonition towards indulgence in the exercise of an allowable discretion must not betray the court into a meddling manifestation of assumed discretion in circumstances which, under the rules, do not bring discretion into operation. Much less should it be resorted to in support of an indefensibly sympathetic appraisal of an attempted showing of 'inadvertence or excusable neglect.' If the showing be inadequate fairly to establish such 'inadvertence or excusable neglect,' the simple, even if sometimes unpleasant, duty of the court is to find accordingly and deny the relief sought.

"Convinced, therefore, of the inadequacy of the present showing, the court is entering an order denying and overruling the motions." Emphasis supplied. *Ledwith v. Storkan,* 2 F.R.D. 539, 544, 545.

Applying that reasoning to the factual situation presented here even if their counsel was mistaken on the day before trial, counsel was present in Court on the day set for trial and there was nothing in the record to show that she would not have represented the Plaintiffs, Appellants herein, if they had been present. She was present in Court; she was not negligent or neglectful, and therefore there is no attempt here to impute her negligence to them because there has been no showing by the Appellants that she was negligent or mistaken on October 6th when the case was called for trial. Assuming arguendo that she was present but somehow or other had committed some form of negligence or made a mistake, the Appellants certainly did nothing to absolve themselves.

The position of the Government is that here there has been no showing of any mistake, negligence or any other reason justifying relief of the operation of the Judg-

ment. Here there was no negligence on the part of the counsel because counsel was present in Court. If there was any negligence, it was on the part of the Appellants because they were not present in Court, blaming their lack of presence on the fact that they had an argument with counsel. They have never set out with any degree of clarity that counsel advised them not to be present the next day unless one might infer that counsel advised them not to be present if they were drunk. Secondly, there was no allegation in the affidavits that counsel advised the Appellants that they should not be present for trial even if they were sober (R-222-226); therefore, if there was negligence on the part of the Plaintiffs they have not even alleged any factual situation in their affidavits that it was excusable; they offer no real excuse. They offer no other factual situation to justify relief from the operation of the Judgment. Defense of this appeal by the Government is not an attempt to name call or to further the interests of non-drinkers. The general imbibing in alcohol is not condemned here. In any event, one cannot blind one's eyes to the facts, and what earthly reason would there be for the Plaintiffs not to be present in Court if they were sober? Rule 60(b)(6) requires a showing of other reasons justifying relief aside from the mistake, inadvertence, excusable neglect, etc. This is essentially *an equitable* principle and it can be hardly said that the Plaintiffs come before this Court with clean hands. *Assmann v. Fleming,* 8 Cir., 1947, 159 F. 2d 332. The Government has no quarrel with the view of the law presented by the Appellants, but the position of the Government is that they do not have sufficient facts to come under the rules of their cited cases. The crux of this appeal is whether or not Judge Ling abused his discretion. One can consider this issue from the standpoint that the facts show as a matter of law that the discretion was or was not abused. On the other hand, have the Ap-

pellants shown sufficient facts to lead this Court to the conclusion that Judge Ling committed an abuse of discretion in denying the Motion to Vacate the Order of Dismissal? In the interests of order each of the Plaintiffs' arguments will be answered.

II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FAILING TO VACATE AND SET ASIDE ITS ORDER OF DISMISSAL, AND DID NOT ABUSE ITS DISCRETION IN REFUSING TO GRANT THE APPELLANTS' MOTION AND IN DENYING THEIR MOTION FOR ORDER SETTING ASIDE THE ORDER OF DISMISSAL FOR APPARENT WANT OF PROSECUTION.

The Government agrees with the ruling and the reasoning as stated by this Court in *Russell v. Cunningham*, 9 Cir., 1960, 279 F. 2d 797. It is difficult to resist the observation that the only similarity between the facts in that case and the case at bar is the name Cunningham.

II-A

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN LAYING ASIDE AND IGNORING AFFIDAVITS PRESENTED BY THE APPELLANTS EVEN IF THE AFFIDAVITS WERE NOT CONTROVERTED BY THE F.B.I. INVESTIGATION.

The affidavits state no reason for relief: they fail to state that defense counsel advised them not to be present in Court at the time set for trial, and they failed to state any reason why they were not present for trial.

The pertinent statement in Price's affidavit is:

"... forced to accept whatever disposition Miss Hash decided to make of the matter." (R-222)

Miss Hash was in Court and withdrew when the Plaintiffs were not present. The most that can be inferred here is Miss Hash represented to Plaintiffs that she would not represent them if they were intoxicated in Court; not that she would not represent them under any conditions.

Cunningham says ". . . In her opinion the Judge would be unwilling. . ." (R-225)

It is interesting to note that Appellants come before this Court with the facade of showing everything that happened. However, where is the affidavit of Miss Hash? The Appellants returned to Phoenix to obtain affidavits to show they were not intoxicated. It would not advance their cause to have an affidavit of Miss Hash to the contrary and for this the Government does not blame them. But if she did advise them not to be present, etc., would she not say so in her affidavit? The Government probably could not get an affidavit from her due to the attorney-client privilege; however, why have the Appellants not come forward with the only affidavit which could truly enlighten this Court?

See *Parker* v. *Broadcast Music, Inc.*, C.C.A., 2, April 27, 1961, 4 F.R. Serv. 2d 606.33.

II-B

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING A MANIFESTLY INEQUITABLE AND UNCONSCIONABLE JUDGMENT TO STAND.

The Government agrees with the view of the law of Plaintiffs-Appellants as set forth in their Argument I-B; however, the problem is, is this Judgment inequitable and unconscionable? There the contention of the appellants falls on the facts.

III

THE APPELLANTS ARE NOT BEING CHARGED WITH ERRONEOUS ADVICE OF COUNSEL, AND EVEN IF COUNSEL DID GIVE THEM ERRONEOUS ADVICE THEY SHOULD NOT BE PERMITTED TO REOPEN AND RENOTE THEIR CLAIMS FOR TRIAL ON THE MERITS.

The Plaintiffs-Appellants have not stated what or how any advice given them by counsel was erroneous, nor have they even stated that their counsel gave them notice that she was going to withdraw no matter how short such notice may have been. Counsel did not withdraw until after the case was called for trial and the Plaintiffs were not present (Appendix A).

IV

THE APPELLANTS HAVE PRESENTED NOTHING TO THIS COURT TO SUBSTANTIATE A REVERSAL BY THIS COURT OF THE ACTION OF THE DISTRICT COURT.

There has been no showing of an abuse of discretion and, as this Court has repeatedly stated, under the rule a refusal to vacate is within the discretion of the Trial Court and may be reversed only for abuse of that discretion. Certainly considering the showing pro and con here, no abuse of discretion is discernible nor was error committed in the procedure followed. The Trial Court's ruling on the motion is accurate and affirmed. *Cole* v. *Fairview Development, Inc.,* 9 Cir., 1955, 226 F. 2d 175. This Court should certainly hesitate to reverse the District Court, especially in view of the fact that the determination of the District Court will not be disturbed except for an abuse of discretion.

"... after a careful review of the transcript of record including the affidavits. We are unable to say that the District Court abused its discretion in denying Appellants' Motion. The Order of the District Court is affirmed." *Siberell* v. *United States,* 9 Cir., 1959, 268 F. 2d 61.

IV-A

THE GOVERNMENT AGREES THAT THE UNQUALIFIED ORDER OF DISMISSAL OPERATES AS A JUDGMENT OF DISMISSAL WITH PREJUDICE UNDER BOTH STATE AND FEDERAL LAW.

Kuzma v. *Bessemer & Lake Erie Railroad,* 3 Cir., 1958, 259 F. 2d 456.

IV-B

THE GOVERNMENT AGREES THAT THE COURTS ARE LOATHE TO IMPOSE FORFEITURES, PARTICULARLY IN SITUATIONS OF DEFAULT WHERE THE EQUITIES REQUIRE TRIAL ON THE MERITS TO IMPOSE FORFEITURE.

There has been no showing here that the equities require a trial on the merits.

IV-B-1

THE GOVERNMENT AGREES THAT IF THERE WERE NEWLY DISCOVERED EVIDENCE IT WOULD BE A PROPER GROUND FOR NEW TRIAL.

Here there is no allegation of newly discovered evidence, and, therefore, even the discussion of the law is inapplicable to this matter.

IV-B-2

THE GOVERNMENT AGREES THAT RULE 60(b) SHOULD BE LIBERALLY CONSTRUED IN CASES OF FORFEITURE FOR WANT OF PROSECUTION.

Certainly there is no reason to do away with the rule entirely since it is merely a standard to be applied when some equitable consideration favorable to the Plaintiff is shown. In this type of situation it should be liberally construed, but the facts are still insufficient to substantially comply with the rule. The *Greenspahn* case quoted below discusses the type of mistake covered by Rule 60(b) (2):

> "The motion to open the decree of August 10, 1949, is grounded on allegations that performance of the decree is impossible because the defendant does not have, and has never had, whiskey of the kind which the decree directs it to deliver, and that this fact was not discovered by the defendant until January 6, 1950. Rule 60(b) permits a party to be relieved from a judgment for the following reasons: '(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); *** or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.' The plaintiff's suit was started in March 1947. The defendant's answer admitting possession of whiskey called for under the court's construction of the contracts was filed on August 1, 1947. On that date and at all subsequent times the defendant's books showed the true facts about the whiskey. The slightest investigation would have disclosed them to the defendant's officer in charge of the litigation. If the motion be viewed as

based on reason (2), newly discovered evidence, it is obvious that the condition of due diligence was not met.

"If it be viewed as based on reason (1), mistake, it appears that the mistake, if any, was only that of the defendant's officer in charge of the litigation. Because of the discretionary character of the remedy of specific performance, a unilateral mistake by the defendant will sometimes be ground for denying the plaintiff a decree for specific performance; *but if the defendant was guilty of gross carelessness in making the mistake, his negligence will dispose the court not to exercise its discretion in his favor.* In the case at bar production records were kept both in Kentucky and in the New York office; all that Mr. Friel had to do to discover the 'mistake' was to call in Mr. Desmond, the employee who maintains the office records of the products distilled by the defendant at its various distilleries; this he could have done at any time after the dispute with the plaintiff arose as readily as on January 6, 1950, when he did so. Mr. Friel was grossly careless for nearly three years. Negligent ignorance frequently has the same effect in law as actual knowledge. Moreover we think the defendant was chargeable with constructive notice of what the bookkeeper who kept the production records knew. Under these circumstances no equitable considerations favor the defendant. There was no abuse of discretion by Judge Abruzzo in refusing to set aside the decree on the ground of 'mistake'." Emphasis supplied.

Greenspahn v. *Joseph E. Seagram & Sons,* 2 Cir., 1951, 186 F. 2d 616, 619, 620.

CONCLUSION

In this brief the Government has confined its arguments to the factual contentions of the Plaintiffs-Appellants because the real issue in this case is a factual

one to establish whether or not, as a matter of law, the Trial Judge abused his discretion.

In their brief Appellants cite *Russell* v. *Cunningham*, 9 Cir., 1960, 279 F. 2d 797. That case is not applicable here because Mr. Russell was prosecuting his appeal at every stage of the proceedings. He was without funds to proceed a long distance to Guam, and could not locate the Defendant. There had also been certain material misrepresentations, coupled with the fact that the Appellant, Russell, showed good faith at every stage of the proceedings. All of these extremely unusual circumstances were recognized by this Court at page 804 of *Russell* v. *Cunningham*, *supra*. No unusual circumstances of an extenuating nature have been shown in the case at bar.

It is with reluctance that the Government feels constrained to comment on certain representations made in the brief of the Appellant against a District Court Judge who has presided on the Federal Bench approximately 25 years and on the State Bench approximately 10 years prior to that, without ever having his integrity or competency called into question. Of course judges, like other men, can make mistakes of judgment and mistakes of law; however, it is not necessary for lawyers to attack judges in any fashion except to say that they were mistaken as to the applicable law or facts. Our contention here is that the Judge has not been mistaken as to the law or facts.

The Appellants state on Page 11 of their brief:

> "The District Court was most unfair in closing itself to remedy by the appellants. It was not concerned with the truth or falsity, or sufficiency with the appellants' showings, and arbitrarily, summarily, and unjustly foreclosed the appellants contrary to the express * * * ."

Yet the Court stated that the Court thought it would be a good idea if the F.B.I. investigated this matter (Appendix B). Certainly this is an indication of the Court's willingness to investigate the true facts in this situation and the care with which the rights of the Appellants were examined.[1]

The statement on page 20 of the Appellants' brief is completely unwarranted. Contrary to Appellants' statement on page 20, the Court did *not* rule that something "speculatively contrary" to the affidavits was true. The ruling of the Court may very well have been based on the fact that the allegations contained in the affidavit were not sufficient to qualify the Plaintiffs for relief under Rule 60(b). The allegations of Appellants (on page 20 of their brief) that it was Judge Ling's intention "... to dispense frontier justice in the nature of 15th Century adversary proceeding prevalent at one time in the British Courts, namely, the District Court wished to engage the Appellants in verbal gymnastics and slight of hand, and to spend as little time in trial session as possible.", is simply not the truth. This Court is requested to take judicial notice of the fact that Judge Ling has had a trial setting for every single day that the Court was in session, except for vacations and illness, and furthermore that the dockets in this district have been so crowded that Congress recently created another judgeship here to relieve the congestion. The Court was ready to proceed to trial, and the Court said: "Yes, I sat around waiting for these people half a day, and a jury. Were they in Phoenix that day?" (Appendix B)

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1 Quite candidly the Government has inserted in its brief and appendix certain matters not in the record (Appendix A, B, and C). One of these is the excerpt from the F.B.I. report. This was necessary because the Appellants went outside the record in stating the Court did not take any additional evidence in the matter, etc. See Pages 7 and 8 of brief for appellants.

To conclude, this Court is respectfully requested to affirm the Judgment of the District Court for the reason that the District Court did not abuse its discretion and the Appellants did not then, and do not now, show a basis for relief under Rule 60(b) F.R.C.P.

Respectfully submitted,

C. A. MUECKE,
United States Attorney for the District of Arizona.

SHELDON GREEN,
Special Assistant to the United States Attorney.
Attorneys for Appellee.

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

GLENN A. PRICE, ET UX, Plaintiffs vs. THE UNITED STATES OF AMERICA, Defendant	NO. CIV - 2963

WILLIAM CARL CUNNINGHAM, ET UX, Plaintiffs vs. THE UNITED STATES OF AMERICA, Defendant	NO. CIV - 2962

Tuesday, October 6, 1959
Ten o'clock A.M.
United States Courthouse
Phoenix, Arizona

TRANSCRIPT OF PROCEEDINGS

BEFORE:

HONORABLE DAVE W. LING, Judge

PRESENT:

For the Plaintiffs: HASH & HASH,

By MISS VIRGINIA HASH, Phoenix, Arizona

For the Defendants: MR. JACK D. H. HAYS,
U. S. Attorney

By MR. WILLIAM E. EUBANK

(Discussion was had in Chambers between Court and Counsel, at which the Court Reporter was not present.)

PROCEEDINGS

THE COURT: You may call the calendar.

THE CLERK: Civil 2962 and Civil 2963; William Carl Cunningham, et ux, vs. The United States of America; and Glenn A. Price, et ux, versus the United States of America. For trial.

THE COURT: Ready?

MISS HASH: If the Court please, at this time the counsel for plaintiff would like to move to withdraw as counsel for both parties, neither of whom are present or ready for trial.

THE COURT: All right.

MR. EUBANK: The Government is ready, your Honor.

THE COURT: All right, you may be allowed to withdraw, and judgment will be entered dismissing the case.

The Court will stand at recess, unless there is something else.

THE CLERK: No, your Honor.

THE COURT: That will be all.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

GLENN A. PRICE, et ux, Plaintiffs vs. THE UNITED STATES OF AMERICA, Defendant	NO. CIV - 2963
WILLIAM CARL CUNNINGHAM, et ux, Plaintiffs vs. THE UNITED STATES OF AMERICA, Defendant	NO. CIV - 2962

Monday, February 8, 1960
11:00 o'clock A.M.
United States Courthouse
Phoenix, Arizona

TRANSCRIPT OF PROCEEDINGS

BEFORE:

HONORABLE DAVE W. LING, Judge

PRESENT:

MR. R. R. GREIVE, 4456 California Avenue,
Seattle 16, Washington,

MR. HERBERT MALLAMO, Phoenix, Arizona,

For the Plaintiffs.

MR. JACK D. H. HAYS, U. S. Attorney,

By MR. WILLIAM E. EUBANK,

For the Defendants.

PROCEEDINGS

THE COURT: You may call the calendar.

THE CLERK: Civil 2963, Glenn A. Price, et ux., vs. The United States of America; and Civil 2962, William Carl Cunningham, et ux., vs. The United States of America.

Plaintiffs' motion to vacate judgment pursuant to Rule 60, lodged 12/28/60; and defendant's motion for security for costs.

MR. GREIVE: Sir, Mr. Mallamo said he would associate with me for the purpose of trying this case.

THE COURT: All right, you may proceed.

MR. GREIVE: If your Honor please, you probably have some memory of this particular case.

THE COURT: Yes, I sat around waiting for these people half a day, and a jury. Were they in Phoenix that day?

MR. GREIVE: They were, your Honor. As I understand it, this was the pre-trial, the day before trial. Anyway, your Honor, being handicapped somewhat, not appearing at the time, and not knowing of the case, and only representing one of the parties previous to this, his lawyer in Seattle, he came to me and explained this situation.

They claim that they last saw their counsel at two o'clock the day before, and the affidavits so state, and at that time the affidavits of the desk clerk, and of the bartender, and of the woman who ran the curio shop in the Sierra Madre Motel, or hotel, contend they were sober and had their faculties.

We have affidavits, of course, from both of the two clients involved, which contend that they were conscious and had use of their faculties; and they do admit they had been drinking before.

In addition to that, we have been given an affidavit from the doctor that Mr. Cunningham, who was in considerable pain, and had been under the use of various types of drugs. We don't say he was necessarily under the use of drugs at that particular time, because the doctor can't say, but certainly the use of liquor might be for that reason in the nature of a mitigating circumstance.

Probably the most important affidavit in the whole works is one from one of the most nationally known authorities on the question of liquor and its effects, a nationally known toxicololgist, a man, a professor at the State of Washington. In the state of Washington all of the fees for licenses go into research on alcohol, and they maintain quite an extensive structure, and they have this toxicologist—this toxicology laboratory.

THE COURT: What does this have to do with this?

MR. GREIVE: He has written an affidavit to the effect that if the determination was made at two o'clock on the day before, or even at 2:30, that the man would have been sober as of the following morning at ten o'clock.

In other words, he says that the effects of alcohol

at the very most could have lasted 24 hours, and would probably have been worn off in twenty hours.

My clients contend they saw no attorney, were told they could not appear, because of their condition, the following day. They say that in all sincerity. I am sure the attorney was sincere that told them they might be thrown in jail, so they were afraid to come to court.

That is what the affidavits say, and that is their position, and that was the reason for not showing; that they never came to court because they were told that they might be in trouble; and this was some twenty hours prior to the time when the motion—when the dismissal took place.

All my clients ask is that they be given the opportunity to have their case heard, and have it heard in good time.

I might add, your Honor, one of my clients is an alcoholic, but prior to this time it had been fourteen or fifteen months since he has taken a drink, but he is one of these people, if he does—The other one is not an alcoholic. He takes a drink, and that is about it.

I am saying that whatever their condition would have been at two o'clock on Monday, they felt that that shouldn't preclude them from their right of trial at ten o'clock on the following day, and their affidavits so state.

Again I say we have the affidavits of the two men involved, for whatever they are worth. We have the affidavits of the desk clerk where they asked that no drink be given to them, at two o'clock, and he would so testify.

We have the fact that the bartender was informed not to give them any drinks, and he said he didn't. They came in and ordered a 7-Up.

We have the affidavit of the woman who sold flowers and curios at that place, and the affidavit of a nationally known man who says if you are taking the determination at two o'clock Monday, by Tuesday they would have every reason to believe they would be cold sober.

THE COURT: You don't have anything to say?

MR. EUBANK: No.

THE COURT: Well, I will think this over. I found them guilty of contempt of court. I will look into that feature of it.

MR. EUBANK: One item, your Honor, and that is that both of the parties certainly knew the time set for the trial, and if you recall, the case came on—

THE COURT: I may have to get a few affidavits from their counsel. I don't know anything about it.

MR. EUBANK: If your Honor please, would you have any objection if I have the FBI investigate it?

THE COURT: No, I think that would be a good idea.

MR. GREIVE: Your Honor, does this mean that I will be informed in due course by mail?

THE COURT: The motion has been submitted.

MR. GREIVE: I needn't come back to Phoenix?

THE COURT: Oh, no.

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the District of Arizona.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Phoenix, Arizona, this 3rd day of June, A.D. 1961.

Jane Horswell

Appendix C

PX 120-72

ROBERT J. FOURNIER furnished the following signed statement:

"Phoenix, Arizona
March 24, 1960

"I, Robert J. Fournier, make the following voluntary statement to Gerard D. Hegstrom and George Hollingsworth who have identified themselves to me as Special Agents of the Federal Bureau of Investigation. I have been advised that this statement can be used in court.

"I, Robert J. Fournier, reside at 1301 E. Virginia Avenue, Phoenix, Arizona, and I am employed as a bellman at the Sahara Hotel.

"During the first week in October, 1959, guests by the names of Cunningham and Price had stayed at the Sahara Hotel. My first contact with these individuals was when the night bellman informed me that they were drunk and that they had requested bellmen to check into their room to see that they had not fallen asleep with lit cigarettes.

"I checked in on them three or four times the first day. During the time they were at the hotel, I served

them alcoholic beverages. I also noted numerous bottles of liquor which apparently they had consumed.

"I recall on one occasion Mr. Cunningham was stretched out on the floor apparently drunk. I cannot say for sure that he was passed out but that the room smelled strongly of liquor.

"During the period they were in the Sahara I had one day off. The following day I checked them out and they both appeared to be under the influence of alcohol or in the stages of recovering from excessive consumption of alcohol. I would say that neither one was sober.

"About a month later Mr. Price returned to the Sahara.

"Mr. Gott, the room clerk, informed me that Mr. Price wanted me to sign a paper. I later learned the affidavit was to the effect that he and Cunningham were sober enough to appear in court. I did not believe this to be true. Mr. Gott left me with the impression that I would be rewarded if I would sign Price's document.

"I talked to Mr. Casey, the manager of the Sahara Hotel and he suggested that I should not sign it if I believed the statement therein to be false.

"The next day Mr. Gott informed me Mr. Price wanted to see me in his room. I went to his room and he endeavored to get me to sign the affidavit.

"I told him I did not think the contents of the affidavit were true. I believe this was the day that they checked out in October.

"Mr. Price did not offer me a reward but I gained the impression that I could expect one if I signed the affidavit.

"I have read this four page statement and it has been read to me. This statement is true to the best of my knowledge. I have initialed all corrections.

"/s/ ROBERT J. FOURNIER

"Witnessed:

"/s/ GERARD D. HEGSTROM, Special Agent for Fed. Bureau of Invest., 3/24/60.

"/s/ GEORGE HOLLINGSWORTH, Spc. Agt. FBI, Phoenix, 3/24/60."